IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-420, 77-421, 77-436

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
and FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., and N-TRIPLE-C INC.,
DATA TRANSMISSION COMPANY (DATRAN),
and SOUTHERN PACIFIC COMMUNICATIONS COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE STATE OF MICHIGAN AND THE MICHIGAN PUBLIC SERVICE COMMISSION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The State of Michigan and the Michigan Public Service Commission (hereafter "Michigan") hereby respectfully move this Court for leave to file the attached brief *amicus curiae* in support of the petitions for certiorari in the above-captioned case.

At the outset, Michigan wishes to point out that the attached brief is sponsored by the undersigned Special Attorney General for the State of Michigan and has been explicitly authorized by the Attorney General for the state. In this regard, Supreme Court Rule 42(4), 28 U.S.C., exempts *amicus curiae* briefs filed by "a state . . . sponsored by its attorney general" from the consent requirements of Supreme Court Rule 42(2). Accordingly, Michigan believes that its brief falls within the ambit of this exemption, and that it would be appropriate for the Court to permit the filing of the brief pursuant to Rule 42(4) without consent having been obtained from the parties to the proceedings below. Nevertheless, out of an abundance of caution and in the event the Court may construe its rule narrowly so as to exclude the brief from the exemption, Michigan is filing the instant motion for leave to file.[1]

The Michigan Public Service Commission (MPSC) is an agency of the State of Michigan charged by statute with responsibilities, *inter alia*, to protect the people of the State of Michigan in matters relating to the cost and quality of telephone service. MPSC has jurisdiction "to regulate all public utilities in the state" with respect to "all rates, fares, fees, charges, services, rules, conditions of service and all other matters" pertaining to such utilities, including all regulatory matters pertaining to telephone companies.[2] MPSC is empowered to fix rates for intrastate telephone service that are "reasonable and just," and is responsible

[1] Michigan has sought consent to the filing of its brief from the parties to the proceedings below. Consent has been obtained from counsel for petitioners, Federal Communications Commission, American Telephone and Telegraph Company, and United States Independent Telephone Association. Consent was not obtained from the respondents.

[2] Mich. Comp. Laws §460.6 (Mich. Stat. Ann. §22.13(b) (Callaghan 1970)).

for protecting consumers against charges that are "unjust and unreasonable."[3] Public utilities in Michigan, including telephone companies, are entitled by law to earn a reasonable return on the value of their investment.[4]

The outcome of this case will significantly affect the manner in which MPSC discharges its statutory responsibilities to the public. The decision below will have a substantial impact on the utilities regulated by MPSC and on customers of telephone service in Michigan whose interest MPSC is charged with protecting. In Michigan and in other states, common facilities are used in the provision of both interstate and intrastate telephone service. Common plant and service costs must be allocated between intrastate and interstate services to reflect the relative use of the common facilities in providing one service or the other. Under the jurisdiction conferred by Section 410 of the Communications Act of 1934, 47 U.S.C. §410, the FCC and representatives of state regulatory commissions have adopted jurisdictional formulas for the allocation of costs between intrastate and interstate services as a function of the relative usage of such services by telephone subscribers.[5]

In this regard, revenues from interstate long distance telephone service are used to defray costs of local service. Permitting carriers other than telephone companies to offer interstate long distance telephone service in competition with telephone companies would significantly reduce the contribution to the cost of local telephone service now

[3] Mich. Comp. Laws §§484.103, 11702, 6691 (Mich. Stat. Ann. §22.1443 (Callaghan 1970)).

[4] *Mich. Bell Telephone Co. v. Michigan Public Service Comm.*, 332 Mich. 7, 50 N.W.2d 826 (1952).

[5] *In the Matter of Prescription of Procedures for Separating and Allocating Plant Investment, Operating Expenses, Taxes and Reserves Between the Intrastate and the Interstate Operations of Telephone Companies*, 26 F.C.C. 2d 248 (1970). See also *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 51 S. Ct. 65, 75 L.Ed. 255 (1930).

provided by long distance revenues. This, in turn, will result in the need for substantial increases in rates for local telephone service.

Given the essential and intimate relationship between interstate and intrastate telephone services and between Federal and State regulatory procedures pursuant to 47 U.S.C. §410, Michigan respectfully submits that its participation in these proceedings is necessary to insure proper representation of the interests of both the utilities and the public in the State of Michigan.

WHEREFORE, it is respectfully requested that this Court grant leave for the filing of the attached brief *amicus curiae* by the State of Michigan and the Michigan Public Service Commission in this case.

Dated this 19th day of October, 1977

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BRIEF *AMICUS CURIAE* OF THE STATE OF MICHIGAN AND THE MICHIGAN PUBLIC SERVICE COMMISSION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

The State of Michigan and the Michigan Public Service Commission (hereafter "Michigan") hereby submit, in accordance with Rule 42 of the Rules of this Court, the following brief *amicus curiae* in support of the Petitions for

Writ of Certiorari filed by the Federal Communications Commission (FCC), American Telephone and Telegraph Company (AT&T), and the United States Independent Telephone Association (USITA). This brief is sponsored by the undersigned Special Attorney General for the State of Michigan and has been explicitly authorized by the Attorney General of the State.

Michigan believes that the Petitions filed earlier in this case and the brief *amicus curiae* filed by National Association of Regulatory Utility Commissioners (NARUC), which Michigan generally supports, set forth compelling reasons why a writ of certiorari should issue. Accordingly, Michigan will not repeat all the reasons that might be advanced in support of a writ, but rather will focus on those which are of particular interest to the State and which it believes are most compelling.

OPINIONS BELOW

The opinion in the Court of Appeals is not yet reported; the decision of the Federal Communications Commission is reported at 60 F.C.C.2d 25. Appendices A and B to the Petition for Writ of Certiorari filed by the Federal Communications Commission (No. 77-436) set out each opinion.[1]

JURISDICTION

The Court of Appeals entered its decision on July 28, 1977. This Court has jurisdiction by virtue of 28 U.S.C. §1254(1).

[1] Michigan will refer to portions of those opinions by citing to the Appendices filed by the Federal Communications Commission (FCC App.).

QUESTION PRESENTED

The question presented to the Court is: Whether the Court of Appeals for the District of Columbia Circuit erred when it held that specialized common carriers such as MCI have authority to provide ordinary long distance telephone service notwithstanding that (1) the FCC had never made the requisite finding that the public interest would be fostered by allowing specialized carriers to provide ordinary long distance telephone service, and (2) the specialized carriers had never requested authority pursuant to 47 U.S.C. §214 to provide ordinary long distance telephone service.

STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended, 47 U.S.C. §§151-609, appear in Appendix D of the Petition for Certiorari filed by the Federal Communications Commission.

STATEMENT OF THE CASE

A. The FCC's Execunet Decision

For purposes of this case, the interstate services provided by communications common carriers can be divided into two categories: (1) ordinary long distance telephone service (MTS) and (2) private line service. Although MTS historically has been provided on a *de facto* monopoly basis by telephone companies, both telephone companies and specialized common carriers have provided private line service on a competitive basis with FCC and judicial approval.[2]

[2] A "private line service" is one "whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time." 47 C.F.R. §21.2 (1976).

The FCC granted the first specialized carrier certificate in 1969 to MCI authorizing the provision of private line services between Chicago and St. Louis. *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), 21 F.C.C.2d 190 (1970). Confronted with a host of similar applications from MCI and other potential specialized carriers, the Commission inaugurated a rulemaking proceeding to address general policy questions common to all applicants, rather than holding a separate hearing on each application. *Specialized Common Carrier Services* (Docket No. 18920), 24 F.C.C.2d 318 (1970). In proposing the rulemaking, the FCC noted that the applicants proposed to provide only "specialized private line services," 24 F.C.C.2d at 324, and thus limited its inquiry to the public interest ramifications of competition in those services, *id.* at 335-38. The FCC ultimately concluded that competition in the limited market for private line services would benefit the public and would have negligible adverse impact on the telephone company carriers. *Specialized Common Carrier Services*, 29 F.C.C.2d 870, 31 F.C.C.2d 1106 (1971). In affirming that decision, the Ninth Circuit interpreted the FCC's policy as sanctioning competition in the field of private line services, but not MTS. *Washington Utilities & Transp. Comm. v. FCC*, 513 F.2d 1142, 1155 (9th Cir. 1975), *cert. denied*, 423 U.S. 826 (1975).

On September 11, 1974, MCI filed tariff revisions with the FCC which contemplated the provision of "metered use service" as an additional part of its private line service offering. AT&T challenged the tariff on the grounds that the proposed service, known as "Execunet," was indistinguishable from ordinary long distance telephone service, and hence was beyond the scope of MCI's limited authorization in the *Specialized Carrier* decision.[3]

[3] FCC App. B at 99a-104a.

Following an investigation of the Execunet tariff, the FCC released its decision on July 13, 1976, confirming its *Specialized Carrier* decision and reiterating that MCI and other specialized carriers had been authorized only to provide private line service.[4] On the basis of unchallenged descriptions of the service, the Commission found that Execunet had "all the essential characteristics of MTS" and "does not have the essential characteristics of private line service * * *"[5] The FCC held unanimously that the proposed service was beyond MCI's limited authority.

B. The Opinion Below

The Court of Appeals reversed, holding that MCI had been authorized to provide not only MTS service, but also any services except those precluded by restrictions the FCC had affirmatively decided were required by "the public convenience and necessity."[6] In its opinion, the court below did not deny that Execunet was a form of MTS service, and it conceded that the FCC had never determined that the provision of MTS service by specialized carriers would benefit the public interest.[7]

INTEREST OF AMICUS CURIAE

The Michigan Public Service Commission (MPSC) is an agency of the State of Michigan charged by statute with responsibilities, *inter alia*, to protect the people of Michigan in matters relating to the cost and quality of telephone service. MPSC has jurisdiction "to regulate all public utilities in the state" with respect to "all rates, fares,

[4] *Id.* at 51a.
[5] *Id.* at 64a.
[6] FCC App. A at 24a.
[7] FCC App. A at 29a, 31a.

fees, charges, services, rules, conditions of service and all other matters pertaining to such utilities," including all regulatory matters pertaining to telephone companies.[8] MPSC is empowered to fix rates for intrastate telephone service that are "reasonable and just," and is responsible for protecting consumers against charges that are "unjust and unreasonable."[9] Public utilities in Michigan, including telephone companies, are entitled by law to earn a reasonable return on the value of their investment.[10]

In Michigan as in other states, common facilities are used in providing both interstate and intrastate telephone service, and common plant and service costs are allocated between the two types of service. Under the jurisdiction conferred by Section 410 of the Communications Act of 1934, 47 U.S.C. §410, the FCC and representatives of state regulatory commissions have adopted jurisdictional formulas for the allocation of costs between intrastate and interstate services as a function of the relative usage of such services by telephone subscribers.[11] Pursuant to these formulas, interstate MTS revenues defray the costs of local telephone service; accordingly, a reduction in the relative quantity of interstate service offered by telephone companies would decrease the amount of common costs

[8] Mich. Comp. Laws §460.6 (Mich. Stat. Ann. §22.13(b) (Callaghan 1970)).

[9] Mich. Comp. Laws §§484.103, 11702, 6691 (Mich. Stat. Ann. §22.1443 (Callaghan 1970)).

[10] *Mich. Bell Telephone Co. v. Michigan Public Service Comm.*, 332 Mich. 7, 50 N.W.2d 826 (1952).

[11] *In the Matter of Prescription of Procedures for Separating Allocating Plant Investment, Operating Expenses, Taxes and Reserves Between the Intrastate and the Interstate Operations of Telephone Companies*, 26 F.C.C.3d 248 (1970). See also *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255 (1930).

recouped in interstate rates and increase costs which would have to be recouped in intrastate rates.[12] Opening the field of MTS service to competition would have the effect of significantly reducing the contribution to the cost of local telephone service that MTS revenues historically have provided. This, in turn, would result in the need for substantial increases in rates for local telephone service. Michigan believes the decision below, if allowed to stand, will have precisely this effect.

Michigan emphasizes that it takes no position at this time on the question whether, on a nationwide basis, the provision of interstate MTS service by specialized common carriers is in the public interest. That determination is properly to be made by the FCC or the Congress, taking into account the views of all interested parties, including state regulatory commissions. Michigan's present concern is that the decision below, *i.e.*, that specialized carriers are authorized to provide interstate MTS service without the FCC having made the proper public interest determination to that effect, will have far-reaching and possibly unintended consequences — consequences that ought to be addressed in a considered fashion before, not after, they occur.

ARGUMENT

There are two reasons why a writ of certiorari is warranted: (1) the decision below raises important questions of statutory construction in that it ignores the plain meaning of 47 U.S.C. §214(c) and is contrary to this Court's interpretation of the Communications Act with respect to the authorization of competitive services in the communications field; and (2) if allowed to stand, the decision

[12] *See, e.g., Washington Utilities and Transp. Comm. v. FCC, supra.*

will seriously disrupt the Federal/State regulatory framework governing communications services.[13]

A. The Opinion Below Improperly Construes The Communications Act of 1934

The court below has construed Section 214 of the Communications Act of 1934, 47 U.S.C. §214, to mean that every FCC authorization under that section is open-ended and unlimited, irrespective of the scope of authority requested by the carrier, unless the FCC makes an "affirmative determination" that restrictions on the authorization are in the public interest.[14] In so holding, the court ignored the plain language of Section 214(c) of the Communications Act.

Section 214(c) sets forth various powers of the Commission with respect to applications for certificates. Specifically, it empowers the Commission to "issue such certificate *as applied for*, or to refuse to issue it, or to issue it for a portion or portions of a line . . . ," and further provides that the Commission "may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."[15] Focusing on the last quoted portion, the court below held that the Commission "cannot impose any restrictions unless it has affirmatively determined that 'the

[13] Michigan recognizes that there are other reasons why a writ should issue as set forth fully in the Petitions filed earlier in this case, particularly the conflict between the opinion below and decisions of the Ninth and Third Circuits in *Washington Utilities & Transp. Comm. v. FCC*, *supra*, and *Bell Telephone Co. of Pa. v. FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). Michigan supports the position that this conflict in the circuits warrants review.

[14] FCC App. A at 20a, 21a.

[15] 47 U.S.C. §214(c), *emphasis added*.

public convenience and necessity [so] require.' "[16] The court thus ignored the statute's prescription that the FCC grant certificates "as applied for" and erroneously converted the authority to condition those certificates into a definition of the scope of authority granted — a definition that is inconsistent with the requirements of the first clause.

Even though it acknowledged that a service like Execunet was not before the FCC in the *Specialized Carrier* case, the court below held that the *Specialized Carrier* decision authorized Execunet service because of the absence of explicit restrictions against providing MTS service. It ignored the fact that the certificates "applied for" in the *Specialized Carrier* case covered only private line services. The court could come to its conclusion that the specialized carriers' facility authorizations are open-ended and unrestricted[17] only by disregarding the plain meaning of the first clause of Section 214(c).

Further, the holding below does not comport with this Court's construction of the Communications Act in *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 73 S. Ct. 998, 97 L. Ed. 1470 (1953), to the effect that the Act requires the FCC to consider, prior to authorizing a carrier to provide a new service, whether competition in that service will have a beneficial effect on the public interest. [18] The court below admitted that it had not itself considered "whether competition like that posed by Execunet is in the public interest," and conceded that this was a question yet to be decided by the FCC.[19] Yet notwithstanding the conceded

[16] FCC App. A at 26a.

[17] *Id.* at 31a.

[18] The principle of *FCC v. RCA Communications, Inc.* was held to apply to carrier applications filed pursuant to Section 214 in *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771 (D.C. Cir. 1974).

[19] FCC App. A at 33a.

absence of the required analysis of public benefit, the court nevertheless found that MCI had authority to offer Execunet service in competition with MTS.

The improper construction of Section 214(c) by the court below and its disregard of the principles of *FCC v. RCA Communications, supra,* warrant the issuance of a writ of certiorari.

B. The Opinion Below Will Disrupt the Federal/State Regulatory Framework

The decision below will undermine the foundation of Federal and State telephone rate regulation by disrupting the long-established and carefully considered cost allocation mechanisms for interstate and intrastate services.[20] It is virtually certain that MCI and other specialized carriers, which previously were thought to be limited by the FCC to private line services, will seek to capitalize on the decision below. The consequent diversion of MTS traffic from telephone companies to the specialized carriers will result in the loss of revenues that now help defray the costs of local telephone service. This loss will in turn create a need for corresponding increases in local telephone rates in Michigan and other states.

To say that the FCC may, in accordance with the opinion below, initiate further proceedings and impose restrictions on the specialized carriers' authorizations is not adequate. Such proceedings would take years to complete, and in the interim specialized carriers would be free to inaugurate any and all manner of services pursuant to the open-ended authority conferred by the court below with no assessment of the public interest consequences having been made by the FCC.

[20] See n. 11, *supra.*

In this regard, MPSC notes again that it takes no position here on the question whether or not, on a nationwide basis, the public interest would be served by competition in long distance telephone service. It may be that the public interest would be advanced by such a change. But if so, Congress or the FCC should make that determination in a considered and deliberate manner, one that affords Federal and State regulators an opportunity to fashion in advance appropriate regulatory procedures for dealing with its impact.

Such a fundamental and far-reaching change should not occur solely as a result of a single decision of one circuit that is at odds with the plain meaning of the Communications Act and contrary to principles established by this Court.

CONCLUSION

For the foregoing reasons, the State of Michigan and the Michigan Public Service Commission respectfully urge this Court to grant the Petitions for Writ of Certiorari.

Respectfully submitted,

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